within the jurisdictional limits of the city of Buena Vista, and, indeed, every fact required to sustain the verdict of the jury. The judgment of the corporation court is therefore affirmed.

Affirmed.

Note.

Caution as to Description of Offense in Future Warrants.—In Lacy *v.* Palmer, 93 Va. 159, 24 S. E. 930, the court, while stating the general rule that in warrants of arrest the same particularity is not expected or required as in indictments, held that greater precision in stating the offense should be observed in future, in view of the fact that justices of the peace are now clothed with exclusive original jurisdiction to try misdemeanors and the warrant gives to the accused the only information as to the nature of the offense with which he is charged.

JOHNSTON & GROMMET BROS. *v.* BUNN & MONTEIRO.

Nov. 21, 1912.

[76 S. E. 310.]

1. Contracts (§ 284*)—Construction Contracts—Final Estimate of Engineer—Condition Precedent.—When a construction contract provides that the engineer in charge of the work shall certify in writing its final completion, together with a final estimate showing the balance due, and that the procuring of such certificate and final estimate shall constitute a condition precedent to any right of action by the contractor against the owner, a suit by a contractor to recover a balance claimed to be due under the contract, without notice to such engineer that the work had been completed, and without any request for such certificate and estimate, is premature; and such suit cannot be maintained when based on estimates of engineers who are strangers to the transaction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1292-1302, 1308-1310, 1312-1316, 1326-1338, 1340-1342, 1344-1346, 1350, 1351; Dec. Dig. § 284.*]

2. Contracts (§ 292*)—Construction Contracts—Certificate of Engineer—Fraud or Mistake.—Under a construction contract making it a condition precedent to action that the engineer shall give a certificate of completion and final estimate, a contractor may maintain an action on the contract to recover the amount due, where the conduct of the engineer designated, is fraudulent, or the engineer has been guilty of a mistake so gross as to amount to a fraud on the rights of the opposite party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1310, 1343; Dec. Dig. § 292.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

3. Contracts (§ 289*)—Construction Contracts—Certificate of Engineer—Refusal to Furnish.—Under a construction contract requiring a certificate and a final estimate of an engineer, a contractor can maintain a suit on the contract without first procuring a certificate from the engineer, where, on demand, the engineer refuses to give such certificate unreasonably.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1310; Dec. Dig. § 289.*]

Appeal from Circuit Court, Wise County.

Suit by Johnston & Grommet Bros. against Bunn & Monteiro. From a decree for plaintiffs, defendants appeal. Affirmed.

Irvine & Morison, of Big Stone Gap, for appellants.
W. S. Mathews, of Big Stone Gap, for appellees.

KEITH, P. Bunn & Monterio filed their bill in the circuit court of Wise county, alleging that the Keokee Coal & Coke Company had entered into a contract with the Black Mountain Railroad Company to construct its roadbed from a point at Imboden, in Wise county, to a point in Lee county near Keokee; that the Keokee Coal & Coke Company entered into a subcontract with Willard Johnston and G. J. and W. J. Grommet, partners trading under the firm name and style of Johnston & Grommet Bros., for the construction of said roadbed, which they had under contract from the Black Mountain Railroad Company; that Johnston & Grommet Bros. sublet a portion of said roadbed to Bunn & Monteiro, between stations 834 and 856, at 70 cents per cubic yard for solid rock, 35 cents per cubic yard for loose rock, and 23 cents per cubic yard for earth; that Bunn & Monteiro completed that portion of the work for which they contracted about the 1st day of June, 1907; and that Johnston & Grommet Bros. on that day owed them the sum of $2,203.21, which they failed and refused to pay, whereupon Bunn & Monteiro, on the 20th day of July, 1907, filed their mechanic's lien in the clerk's office of Wise county, claiming a lien on the Black Mountain Railroad and franchises between the stations mentioned to secure the payment of said sum.

It appears, therefore, that Bunn & Monteiro were subcontractors under Johnston & Grommet Bros. By the terms of the contract between the Keokee Coal & Coke Company and Johnston & Grommet Bros., it is provided, among other things, that "whenever, in the opinion of the chief engineer of the Keokee Coal & Coke Co., this contract and all things herein agreed to be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

done by contractors shall have been completely performed and finished according to the provisions thereof and within the limited time, said chief engineer of the railway company shall make and return a final estimate of the work done by contractors under this contract, and shall certify the same in writing under his hand, the Keokee Coal & Coke Co. shall within thirty days after the completion of the work aforesaid and the return of said final estimate pay to the contractors the full amount so far to be due them and remaining unpaid, including the percentage retained in former estimate as aforesaid, except as in this contract is otherwise provided. The procuring of such certificate and final estimate shall constitute a condition precedent to any right of action by contractors against the Keokee Coal & Coke Co."

[1, 2] In that suit such proceedings were had that a decree was entered which ascertained that there was due the plaintiffs, Bunn & Monteiro, by Johnston & Grommet Bros. the sum of $2,203.21, with interest thereon from the 1st day of June, 1907, till paid, subject to a credit of $522.15 as of October 31, 1907. From this decree Johnston & Grommet Bros. appealed, and this court reversed the decree of the circuit court, holding that "when a contract provides that the engineer in charge of work shall certify in writing its final completion, together with a final estimate showing the balance due, and that the procuring of such certificate and final estimate shall constitute a condition precedent to any right of action by the contractor against the owner, a suit by the contractor to recover a balance claimed to be due under the contract, without notice to such engineer that the work has been completed, and without any request for such certificate and estimate, is premature. The suit cannot be maintained when based upon estimates of engineers who are strangers to the transaction. If the conduct of the engineer designated by the contract is fraudulent, or he has been guilty of a mistake so gross as to amount to a fraud on the rights of the opposite party, the latter is not bound by his estimates, but may maintain an action on the contract to recover the amount due; but where no such conditions exist the parties are bound by the terms of their contract." Johnston *v.* Bunn, 108 Va. 490, 62 S. E. 341, 19 L. R. A. (N. S.) 1064.

The case having been remanded to the circuit court, it was referred to a commissioner in chancery, who returned a report in favor of the plaintiffs for $1,396, with interest from the 1st day of June, 1907, and the circuit court rendered a decree in favor of the plaintiffs for that amount, which has been brought by appeal to this court for review.

The contention of appellants is that the appellees have failed to establish their claim by a preponderance of evidence.

The commissioner reports, among other things, that:

"Nowhere in the record appears the final estimate of the chief engineer of the Black Mountain Railway Company of the quantity and classification of material moved between stations 834 and 856. The estimate of Henry J. Oewel is based on records found by him in the office of the railroad company. The estimate of E. S. Fraser, as given in evidence, is made from a portion of the records of that work in his possession on the date he gave his deposition. A. N. Bullitt, chief engineer of the Keokee Coal & Coke Company, testified that he had received the final estimate from Mr. Fraser, and that his own estimate was identical with Mr. Fraser's. There is a discrepancy between the figures given by Mr. Oewel and Mr. Fraser; but it is assumed, for the purpose of this report, that the estimate of the latter represents substantially the 'final estimate as rendered by Mr. Fraser to the Keokee Coal & Coke Company. All three estimates are based upon the original calculations and measurements made by Mr. Fraser and those on the ground representing him.

"The estimates of H. E. Fox and Malcolm Smith were made from independent surveys and measurements. They differ to some extent, both as to classification and measurements of material removed by the plaintiffs, but are, in substance, similar, when compared with the estimate as given by the railway company. Without imputing bad faith to any of the engineers representing the railroad company, your commissioner submits that a discrepancy in measurement resulting in a difference in the case of the highest priced material of over 1,000 cubic yards, and in the amount to be paid for the work of $1,000 or more, in a contract of this size, is an indication of a mistake so great as to work a hardship upon the parties suffering thereby.

"The final estimate of this work, under the contract between the parties, was to be made by Mr. Fraser, chief engineer of the Black Mountain Railway Company. The resident engineer of the company, under Mr. Fraser, under whose immediate supervision the work was done, was a Mr. Seahorn. Mr. Seahorn's evidence is not in the record. From the deposition of Mr. Geo. Norton, however, and other testimony, some of which may be hearsay and incompetent, your commissioner is convinced that Mr. Seahorn was informed of errors in the figures on which Mr. Fraser based his estimate of the work done by the plaintiffs. Although the evidence may not fix the identical point at which the errors occurred, your commissioner believes that it establishes their existence clearly and convincingly, and ascertains their character and size. Your commissioner is, therefore, of the opinion that the estimate of the chief engineer was erroneous, and to an extent that its ascertainment of the quantity and char-

acter of the excavation made by Bunn & Monteiro between stations 834 and 856 of the railroad in question would operate as a fraud upon the rights of the said Bunn & Monteiro.

"In ascertaining the correct amount due by the defendants, Johnston & Grommet Bros., to the plaintiffs, Bunn & Monteiro, your commissioner, therefore, disregards the estimate of E. S. Fraser. As to which of the estimates made by the engineers employed by the plaintiffs should be adopted, your commissioner has been undecided. Malcolm Smith, however, had the advantage of the information acquired by the different engineers making previous surveys of the work, and was thus in position to get the most accurate results in his work. Your commissioner, therefore, reports his estimate of the work done as the basis for calculating the amount due Bunn & Monteiro."

The principal exceptions to the report of the commissioner are, "first, that the complainant have failed to establish by a preponderance of the evidence the facts as alleged in their bill; second, that said special commissioner arbitrarily selected the report of Engineer Malcolm Smith as a basis for his report, disregarding all other evidence in this cause which was in conflict therewith."

We think that the report of the commissioner answers both of these propositions. It shows that he has carefully weighed and considered all of the evidence, and that his reliance upon Engineer Smith was not arbitrary, but that his testimony was relied upon by the commissioner for sufficient and intelligent reasons, which are set out in the extract which we have given from his report.

The law of the case is correctly stated in Johnston *v.* Bunn, supra, and in the still more recent case of Cornell *v.* Steele, 109 Va. 589, 64 S. E. 1038, 132 Am. St. Rep. 931, referred to in the report of the commissioner.

[3] The case, as we have seen, was reversed in this court because the contract provided that the engineer in charge should certify in writing the final completion of the work, together with his estimate showing the balance due, and that the procuring of such certificate and final estimate should constitute a condition precedent to any right of action by the contractor against the owner, and that therefore the suit was premature. It appears from the evidence now in the record that a final estimate was demanded of the engineer in charge, and that no final estimate was ever given by him. We are of opinion that there is no sufficient reason shown for the refusal upon the part of the engineer in charge to make a final estimate of the work, and his refusal, under all the circumstances, was arbitrary and unreasonable and arose from no default on the part of the appellees, from which

it results that we are of opinion that, under the facts of this case as now disclosed, the appellees could maintain their suit without having first procured a certificate from the engineer in charge, certifying in writing the final completion of their contract and a final estimate showing the balance due.

Upon the whole case we are of opinion that there is no error in the decree of the circuit court, which is affirmed.

Affirmed.

CARDWELL, J., absent.

DAVIS v. MARSHALL.

Nov. 21, 1912.

[76 S. E. 316.]

1. **Equity (§ 331*)—Pleading—Waiver of Error—Amendment of Bill.**—A complainant who, by leave of court, files an amended bill after a demurrer to the original bill is sustained, acquiesces in the court's action upon the demurrer, and cannot afterwards assign error thereon.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 331.*]

2. **Principal and Agent (§ 78*)—Accounting.**—While equity may adjust accounts between principal and agent at the suit of a principal against the agent where confidence is reposed in the latter, as a general rule, a bill for an accounting by an agent will not lie against his principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 162-177; Dec. Dig. § 78.*]

3. **Pleading (§ 8*)—Sufficiency of Allegations—Facts or Conclusions.**—Even if the bill showed an exceptional case justifying the allowance of an accounting in a suit by an agent against his principal, bare allegations that there are many items of mutual, current, and in some instances confused, accounts existing between them as principal and agent did not sufficiently allege facts to authorize such an accounting.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

4. **Account (§ 1*)—Grounds—Loss of Account Books.**—While equity has jurisdiction to grant relief in cases of lost deeds and certain other instruments, the loss or destruction of account books or of items of accounts is not of itself a ground of equity jurisdiction to compel an accounting.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 1-8; Dec. Dig. § 1.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.